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ADVANCE SHEET HEADNOTE
June 4, 2012

2012 CO 43

No. 11SA261, Sender v. Cygan (In re Rivera) - Real Property - Recording - Sufficient notice

In response to a certified question posed by the United States Bankruptcy Court for the District of Colorado, the supreme court holds that a recorded deed of trust that completely omits a legal description is defectively recorded and cannot provide constructive notice to a subsequent purchaser of another party's security interest in the property. The supreme court holds that, under the circumstances of this case, actual knowledge cannot be imputed to the trustee, and the deed of trust did not otherwise provide sufficient notice of the defendant's security interest in the debtor's property. The supreme court therefore answers the certified question in the negative and returns the case to the United States Bankruptcy Court for the District of Colorado for further proceedings.

Supreme Court of the State of Colorado
101 West Colfax Avenue, Suite 800 • Denver, Colorado 80202

2012 CO 43

Supreme Court Case No. 11SA261

Certification of Question of Law

United States Bankruptcy Court for the District of Colorado
Chapter 7 Case No. 09-23209-SBB
Adversary Case No. 11-01378-SBB
Honorable Sidney B. Brooks, Judge

In re: Anthony E. Rivera, Debtor,

Plaintiff:

Harvey Sender, Chapter 7 Trustee,

v.

Defendants:

Norman K. Cygan and Carol S. Cygan.

Certified Question Answered

en banc

June 4, 2012

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JUSTICE MÁRQUEZ delivered the Opinion of the Court.

JUSTICE COATS dissents.

¶1 Pursuant to C.A.R. 21.1, we agreed to answer a certified question of law posed to us by the United States Bankruptcy Court for the District of Colorado. The question arises out of an adversary proceeding in which the plaintiff, in his capacity as Chapter 7 Trustee, seeks to assert his “strong arm” powers under 11 U.S.C. § 544(a)(3) to avoid the defendants’ security interest in the debtor’s property and to recover the property for the benefit of the estate under 11 U.S.C. § 550(a)(1). At the time the bankruptcy petition was filed, the defendants’ security interest was documented in a deed of trust that was recorded and properly indexed in the City and County of Denver, where the encumbered property is located. The recorded deed identified the encumbered property by a correct and complete street address and expressly referred to an attached legal description of the property. The recorded deed, however, omitted the referenced attachment. The Trustee contends that, because the recorded deed of trust did not contain a legal description of the encumbered property, it failed to provide sufficient notice of the defendants’ security interest to a subsequent purchaser of the property under sections 38-35-109(1) and 38-35-122, C.R.S. (2011).

¶2 The Bankruptcy Court’s certified question asks:

Whether a properly recorded deed of trust provides sufficient notice of a party’s interest in the property if the deed of trust contains *no legal description* and identifies the property *only* by a street address.

¶3 We hold that a recorded deed of trust that completely omits a legal description is defectively recorded and cannot provide constructive notice to a subsequent purchaser of another party’s security interest in the property. Under the circumstances of this case, the deed of trust did not provide sufficient notice of the defendants’ security

interest in the debtor's property. We therefore answer the certified question in the negative. We recognize that this outcome may appear harsh given that the failure to record the attachment containing the legal description was unintentional. However, our holding is consistent with Colorado's recording statutes and longstanding practice, and is the only conclusion that accords appropriate respect for the need for certainty and stability in Colorado's real property system.

I. Facts and Procedural History

¶4 We summarize the facts provided by the bankruptcy court under C.A.R. 21.1(c)(2) to give context for the question certified. In 2006, Anthony E. Rivera ("Debtor") executed a promissory note payable to Norman K. Cygan and Carol S. Cygan ("Defendants"). The promissory note was secured by a deed of trust dated June 29, 2006, encumbering a condominium unit located in the City and County of Denver. The deed accurately identifies the complete street address of the encumbered property, including the condominium unit number. The deed of trust does not contain the legal description of the property, but instead describes the encumbered property as: "SEE EXHIBIT A - LEGAL ATTACHED." On July 11, 2006, the deed was recorded in the real property records of the Clerk and Recorder of Denver County, Colorado, and was properly indexed in the grantor-grantee index for the City and County of Denver. However, when the deed was recorded, "Exhibit A" containing the legal description was not attached.

¶5 In July 2009, the Debtor filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Plaintiff Harvey Sender was appointed Chapter 7 Trustee ("Trustee"). The

Debtor listed the real property at issue here as an asset. In August 2009, the Defendants filed a motion for relief from the automatic stay, seeking leave to enforce their security interest in the property. The Defendants attached to their motion a partial copy of the deed of trust along with Exhibit A containing the legal description. The Defendants' motion did not state that Exhibit A had not been recorded with the deed.¹ The Trustee did not oppose the motion.

¶6 The bankruptcy court granted the motion for relief from the automatic stay in September 2009, and the Defendants commenced judicial foreclosure proceedings on the property. On April 14, 2011, the Defendants obtained a reformation of the deed and a judgment of foreclosure in state court.²

¹ It is not clear from the record before us whether the Defendants were aware at the time they filed their motion that Exhibit A had been omitted from the recorded deed.

² The state trial court issued a combined order reforming the deed and granting a judgment of foreclosure. In its order, the trial court found that "the omission of Exhibit A to the Deed of Trust was a mutual mistake of the parties, as the Scrivener failed to record Exhibit A" containing the legal description. The court found that "the parties intended to have the Exhibit recorded with the Deed of Trust as the Deed of Trust acknowledges that fact: 'SEE EXHIBIT A - LEGAL ATTACHED.'" Accordingly, the court reformed the deed of trust to include the legal description of the property. See Alexander Dawson, Inc. v. Sage Creek Canyon Co., 37 Colo. App. 339, 341, 546 P.2d 969, 970-71 (1976) (holding that an error in the legal description of a property in a deed of trust was scrivener's error and, in the absence of fraudulent or inequitable conduct by a party to the deed, the trial court properly reformed the legal description in the deed of trust). However, the reformation of the deed by the state trial court in April 2011 does not impact the Trustee's strong arm powers under 11 U.S.C. § 544(a)(3) in this case because, as discussed in Part II.A, the Trustee stands in the shoes of a hypothetical bona fide purchaser of the Debtor's property at the time the Debtor filed for bankruptcy in July 2009.

¶7 Thereafter, the Trustee brought an adversary proceeding in the bankruptcy court that gave rise to the question certified here. The Trustee asserted that his strong arm powers under 11 U.S.C. § 544(a)(3) permit him to avoid the Defendants' security interest in the Debtor's condominium unit and thus recover the deed of trust or the value thereof from the Defendants for the benefit of the bankruptcy estate. The parties dispute whether the recorded deed of trust provided sufficient notice of the Defendants' security interest in the Debtor's condominium unit. Because the sufficiency of a property description in a deed is a question of state law, and because the issue of whether a deed of trust that contains no legal description can provide sufficient notice of the encumbrance is one of first impression, the bankruptcy court certified this question to this court. We accepted jurisdiction.

II. Analysis

¶8 The bankruptcy court has asked us to determine whether, under Colorado law, a recorded deed of trust provides "sufficient notice" of a party's interest in the property if the deed of trust identifies the encumbered property by a correct and complete street address but contains no legal description. Although the certified question assumes that the deed of trust here was "properly recorded," we interpret that phrase in the question to mean simply that the recorded deed of trust was properly indexed in the grantor-grantee index, and not that the deed was necessarily free of all defects that might render it invalidly recorded.

¶9 We conclude that a recorded deed of trust that completely omits a legal description is defectively recorded and cannot provide constructive notice to a

subsequent purchaser of another party's security interest in the property. Under the circumstances of this case, we cannot impute actual notice to the Trustee, and the deed of trust did not otherwise provide sufficient notice of the Defendants' security interest in the Debtor's property. We therefore answer the bankruptcy court's certified question in the negative.

A.

¶10 The bankruptcy court's certified question arose because the Trustee seeks to avoid the Defendants' deed of trust using the "strong-arm" power set forth in 11 U.S.C. § 544(a)(3). Under that provision, a bankruptcy trustee stands in the shoes of a bona fide purchaser of real property from the debtor, and may avoid a security interest in the debtor's real property if a hypothetical bona fide purchaser could have acquired that property free and clear of the security interest at the time the bankruptcy case commenced. See 11 U.S.C. § 544(a)(3) (2006); Hill v. Taylor (In re Taylor), 422 B.R. 270, 273 (Bankr. D. Colo. 2009). Under such circumstances, the trustee may recover the deed of trust for the benefit of the bankruptcy estate. 11 U.S.C. §§ 544(a), 550 (2006); see also In re Taylor, 422 B.R. at 273. Whether a hypothetical bona fide purchaser could have obtained real property free and clear of a security interest is a question of state law. See In re Taylor, 422 B.R. at 273 (citing Zilkha Energy Co. v. Leighton, 920 F.2d 1520 (10th Cir. 1990)).

¶11 In Colorado, a bona fide purchaser of property is one who pays value, in good faith, without any notice of defect in title. See Martinez v. Affordable Hous. Network, Inc., 123 P.3d 1201, 1206 (Colo. 2005). Colorado's race-notice recording statute protects

purchasers who acquire an interest in property in good faith without notice of a prior unrecorded instrument or document encumbering that property. See § 38-35-109(1), C.R.S. (2011); In re Taylor, 422 B.R. at 273; Guar. Bank & Trust Co. v. LaSalle Nat'l Bank Ass'n, 111 P.3d 521, 523 (Colo. App. 2004). In other words, an unrecorded encumbrance on real property has no effect with respect to a subsequent bona fide purchaser who acquires that property without notice of the encumbrance. Conversely, a purchaser who has notice of an encumbrance or defect in title does not qualify as a bona fide purchaser and cannot take the property free and clear of that encumbrance.

¶12 We have traditionally recognized three forms of notice: actual notice, constructive notice, and inquiry notice. Franklin Bank, N.A. v. Bowling, 74 P.3d 308, 313 (Colo. 2003). Actual notice exists when one has actual knowledge of another's claim. Id. By contrast, constructive and inquiry notice operate to impute knowledge to a party under certain circumstances. Id.

¶13 Constructive notice is essentially record notice. When a party properly records his interest, the party gives constructive notice to the public of his claim. Id. A properly recorded instrument operates to alert future grantees of the recording party's rights because the law assumes that a grantee will search the index at the county clerk and recorder's office and discover the claim. Id.; Guar. Bank & Trust Co., 111 P.3d at 523. Thus, the law charges subsequent purchasers with constructive notice of a properly recorded interest, even if they do not locate it. Franklin Bank, N.A., 74 P.3d at 313 (quoting 14 Richard R. Powell, Powell on Real Property § 82.03[2][b][ii] (Michael Allan Wolf ed., 2003)).

¶14 Inquiry notice likewise operates to impute knowledge to a party under certain circumstances. However, “[u]nlike constructive notice, inquiry notice depends on extrinsic factual inquiry.” *Id.* at 313 n.11. Inquiry notice arises where a party “becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another.” *Id.* at 313. “[O]nce there is a duty to inquire, the purchaser ‘will be charged with all knowledge that a reasonable investigation would have revealed.’” *Martinez*, 123 P.3d at 1207 (quoting *Franklin Bank, N.A.*, 74 P.3d at 313).

¶15 Here, the Trustee cannot use his strong arm power to avoid the Defendants’ security interest in the Debtor’s property unless, at the time the bankruptcy proceedings commenced, a hypothetical purchaser could have purchased the property in good faith without notice of the Defendants’ security interest. We now turn to whether the deed of trust in this case, recorded without any legal description, provided such notice to a hypothetical purchaser.

B.

¶16 In Colorado, all written instruments conveying, encumbering, or affecting title to real property may be recorded in the office of the clerk and recorder of the county where the property is located. § 38-35-109(1), C.R.S. (2011). The purpose of recording such documents is to provide notice to prospective purchasers of encumbrances on title, and to protect certainty and marketability of title to real property. *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 312 (Colo. 2003); *Page v. Fees-Krey, Inc.*, 617 P.2d 1188, 1193 & n.7 (Colo. 1980); see also § 38-34-101, C.R.S. (2011) (stating that the purpose and intent of

Colorado's conveyancing and recording statutes is to render interests in real property "more secure and marketable.").

¶17 Here, whether a hypothetical purchaser would be charged with constructive notice of the Defendants' security interest depends on whether the interest was properly recorded. We construe sections 38-35-122 and 38-35-109(1), C.R.S. (2011), and hold that a deed of trust that completely omits any legal description is defectively recorded and cannot provide constructive notice of the encumbrance to a subsequent purchaser.

1.

¶18 Colorado's race-notice recording statute provides that "no . . . unrecorded instrument or document" shall be valid against a purchaser without notice who records first. § 38-35-109(1), C.R.S. (2011). This provision is silent with respect to what information the recorded instrument must contain. However, section 38-35-122(1)(a), C.R.S. (2011), provides:

All documents of title relating to real property, including instruments creating a lien on real property, except mechanics' liens and judgment liens, shall include as an aid to identification, immediately preceding or following the legal description of the property, the street address or comparable identifying numbers, if such address or numbers are displayed on the property or any building thereon.

(Emphasis added). This provision presumes that a valid deed of trust necessarily must contain a legal description because the separately required street address must

“precede” or “follow” the “legal description.”³ Section 38-35-122(1)(b) similarly assumes that conveyance documents will contain a legal description, and allows preparers of such documents to also include the assessor’s schedule number or parcel number as an aid to identification “immediately preceding or following the legal description of the property.”

¶19 That section 38-35-122 implicitly requires documents of title relating to real property to contain a legal description becomes even more evident when viewing the remainder of the statute, which treats the legal description as legally more significant than the street address. For example, section 38-35-122(2) provides that “[s]hould any variance or ambiguity result from the inclusion of a street address . . . the legal description of the property shall govern.” Additionally, section 38-35-122(3) provides that the omission of a street address will not void the instrument “if the legal description appears therein.” Notably, the statute contains no corresponding provision that forgives the absence of a legal description. Viewed as a whole, section 38-35-122 reflects that a valid deed of trust necessarily must contain a legal description.

¶20 This interpretation is consistent both with longstanding practice in Colorado and with the overall purpose and intent of Colorado’s recording statutes to render interests in real property “more secure and marketable.” § 38-34-101, C.R.S. (2011). Legal

³ A “legal description” is defined as “[a] formal description of real property, including a description of any part subject to an easement or reservation, complete enough that a particular piece of land can be located and identified.” Black’s Law Dictionary 976 (9th ed. 2009). A legal description “can be made by reference to a government survey, metes and bounds, or lot numbers of a recorded plat.” Id.

descriptions historically have served as the primary means of identifying real property in instruments affecting title. See, e.g., Wixon v. Wixon, 76 Colo. 392, 232 P. 665 (Colo. 1925); Wedman v. Carpenter, 65 Colo. 63, 173 P. 57 (Colo. 1918); Derham v. Hill, 57 Colo. 345, 142 P. 181 (1914); see also Chase Home Fin., LLC v. Calloway (In re Calloway), 429 B.R. 802, 813 (Bankr. N.D. Ala. 2010) (“[H]istorically real property has not been conveyed or encumbered by mere street address; legal descriptions, whether metes-and-bounds or recorded plat, or reference to previously recorded instruments containing legal descriptions, are universally utilized in instruments intended for recordation, and such descriptions are justifiably the primary focus of persons searching in public records.”).

¶21 Section 38-24-122, read as a whole, unquestionably elevates the legal significance of a legal description over a parcel’s street address. This approach reflects the decidedly increased precision that a legal description provides over a street address. A street address certainly serves as an “aid to identification” in combination with the legal description. See § 38-35-122(1)(a). But standing alone, a street address may not accurately or fully describe the property interest impacted by a lien. For example, a street address could, in some instances, apply to all or only part of an entire apartment building, or to all or only part of a sprawling ranch or mountain property. Moreover, in Colorado, an interest in real property might include, for example, subsurface mineral rights, a ditch easement, or a deeded right of way to a ski slope or recreation area -- appurtenant rights that will not be reflected in a street address, but that will be evident in a legal description. In short, a legal description, unlike a street address, provides the

precise parameters of the encumbered property. Indeed, in this case, the Defendants' security interest (as described in the unrecorded Exhibit A) includes not only the physical area of the condominium unit, but also other property interests, including undivided fractional interests in the condominium and apartment building, the right to use a numbered parking stall and certain common areas, and a common right of way for ingress and egress.

¶22 In recognition of the historical importance of legal descriptions and of the increased precision they provide, we conclude that section 38-35-122 requires a valid deed of trust to contain a legal description.

2.

¶23 In this case, the deed of trust executed by the Defendants and the Debtor did contain a legal description, in conformity with section 38-35-122. That legal description was contained in an attachment. However, when the deed was recorded, the attachment, Exhibit A, was omitted. Hence, the recorded deed of trust contained a complete and accurate street address, but no legal description of the encumbered property. We conclude that the complete omission of the legal description in the recorded deed rendered the recording defective.

¶24 Colorado case law reflects that a recorded instrument containing an erroneous or incomplete legal description may nonetheless provide sufficient notice of an encumbrance so long as the instrument describes the encumbered property with reasonable certainty. See, e.g., Harrison v. Everett, 135 Colo. 55, 60, 308 P.2d 216, 219 (1957) ("If the description in a deed identifies, or furnishes the means of identifying, the

property conveyed, it performs its function.”); People v. Ginn, 106 Colo. 417, 428, 106 P.2d 479, 484 (1940) (acknowledging in dicta that a subsequent mortgagee had constructive notice of a prior encumbrance despite an error in the legal description of the encumbrance); Guar. Bank & Trust Co. v. LaSalle Nat’l Bank Ass’n, 111 P.3d 521, 524-25 (Colo. App. 2004) (holding that a deed of trust that omitted the block number of a property, but otherwise contained sufficient information to establish the identity of the property, provided constructive notice of an encumbrance on the property); see also Hill v. Taylor (In re Taylor), 422 B.R. 270, 274-75 (Bankr. D. Colo. 2009) (holding that, under Colorado law, a properly indexed deed of trust that contained a correct street address but a legal description identifying the wrong block number for the parcel, nevertheless placed a bankruptcy trustee on inquiry notice of an encumbrance on the property). These cases reflect the general principle that an error in the description of the property does not render the instrument incapable of providing notice to a subsequent purchaser of an encumbrance, at least where the recorded instrument describes the property with reasonable certainty. However, each of these cases involved a minor typographical error or discrepancy in the legal description, and not the complete absence of any legal description. We decline to extend this general principle to a recorded deed of trust that completely omits a legal description. As discussed above, section 38-35-122 requires a valid deed of trust to contain a legal description. A deed of trust that completely omits a legal description therefore does not meet the requirements of section 38-35-122 and cannot be validly recorded. Moreover, because the purpose of recording a deed of trust under section 38-35-109 is to provide

notice to the public of the recording party's interest, a deed of trust that is recorded without any legal description materially fails to describe the recording party's interest in the property. Such a recording is void and therefore incapable of providing constructive notice of the encumbrance.

¶25 In this case, the recorded deed completely omitted any legal description of the property; thus, the recording was void and could not provide constructive notice of the encumbrance to a prospective purchaser.

C.

¶26 Our conclusion that the defectively recorded deed of trust in this case was incapable of providing constructive notice does not end the bona fide purchaser analysis, because actual notice of another party's interest in property will defeat a purchaser's ability to obtain that property free and clear of the encumbrance, regardless of whether the encumbrance was properly recorded. Here, the Trustee did have actual notice of the Defendants' deed of trust, including the legal description in Exhibit A. However, under section 544(a) of the Bankruptcy Code, we cannot impute this knowledge to the Trustee. 11 U.S.C. § 544(a) (2006) (providing that the strong arm powers exist "without regard to any knowledge of the trustee"); see also Chase Manhattan Bank, USA, N.A. v. Taxel (In re Deuel), 594 F.3d 1073, 1077 (9th Cir. 2010); Alpine Bank v. Moreno (In re Moreno), 293 B.R. 777, 781-82 (Bankr. D. Colo. 2003); Bandell Invs., Ltd. v. Capitol Fed. Sav. & Loan Ass'n of Denver (In re Bandell Invs., Ltd.) 80 B.R. 210, 212 (Bankr. D. Colo. 1987) ("Actual knowledge of the parties is irrelevant to § 544(a).").

¶27

Finally, inquiry notice likewise will defeat bona fide purchaser status where a purchaser becomes aware or should have become aware of facts triggering a duty to inquire, and a reasonable investigation would have revealed the encumbrance. See Franklin Bank, N.A. v. Bowling, 74 P.3d 308, 313 (Colo. 2003). However, because the deed of trust in this case was defectively recorded, we cannot conclude that it triggered any duty to inquire. Although a real purchaser might have acquired knowledge of other facts sufficient to trigger a duty to inquire, and a reasonable investigation might have revealed the Defendants' encumbrance on the Debtor's property, such facts are not before us in this hypothetical purchaser setting.

III. Conclusion

¶28

Because the recorded deed of trust in this case completely omitted any legal description of the encumbered property, it was defectively recorded and therefore could not provide a hypothetical purchaser constructive notice of the Defendants' security interest in the property at the time the bankruptcy proceedings commenced. Although today's result may appear severe given the circumstances of this case, real property is an area of the law that demands certainty and dependability, and, standing alone, a street address may not accurately or fully describe the property interest impacted by a lien. Our holding is required by Colorado's recording statutes, is consistent with longstanding practice, and is necessary to protect all future bona fide purchasers who take title to real property without notice of an unspecified encumbrance, the parameters of which are not apparent from the deed of trust's use of only a street address.

¶29 Under the circumstances of this case, we cannot impute to the Trustee actual knowledge of the Defendants' security interest, and the deed of trust did not otherwise provide sufficient notice of the encumbrance. We do not reach any of the Defendants' additional claims related to the Trustee's failure to object to the Defendants' motion for relief from the automatic stay, such as waiver or laches, as the bankruptcy court expressly reserved such claims in its certification order. Accordingly, we answer the certified question in the negative and return this case to the United States Bankruptcy Court for the District of Colorado for further proceedings.

JUSTICE COATS dissents.

JUSTICE COATS, dissenting.

¶1 Because I believe the majority’s reasoning lacks support in statute, case law, logic, or even policy, I respectfully dissent.

¶2 The majority concludes that a recorded deed of trust describing real property by no more than a street address cannot possibly provide sufficient notice of any interest in that property because such a deed would necessarily be “defectively recorded.” By “defectively recorded,” the majority, of course, does not mean that such a deed could not have been received and entered by the appropriate clerk and recorder, in the manner statutorily prescribed for providing constructive notice to third parties, but rather that it would be inherently so defective as to not even constitute a “deed,” or other instrument “affecting the title to real property,” within the meaning of the recording statute. In actuality, therefore, the recording statute is only secondarily related to the majority’s answer to the certified question. Instead, its conclusion rests primarily on the proposition that such a deed of trust is incapable of conveying, encumbering, or otherwise affecting the title to real property and therefore is not valid against a person with any kind of rights in or to that property, whether he has notice of it or not. I not only consider this proposition of law to be erroneous but in fact the product of somewhat muddled reasoning.

¶3 The majority understands section 38-35-122 to require that a deed of trust, in order to be “valid,” must contain a “legal description” of the property, by which the majority apparently intends some description more complete or formal than, or at least different from, a street address. The term “legal description” is, however, nowhere defined as a

specific statutory term of art. Typically, it refers to a “metes and bounds” description or, with regard to platted property, specification of particular lots of the recorded plat. The term is not so limited, however, and other forms of description, such as description by natural or artificial monuments or marks, have also been held legally sufficient. See 4 Herbert T. Tiffany & Basil Jones, *Tiffany Real Property* §§ 994, 997 (2011). In the past, we have in fact made clear that no more is required for a valid instrument of conveyance than a description that “identifies, or furnishes the means of identifying, the property conveyed.” Harrison v. Everett, 135 Colo. 55, 60, 308 P.2d 216, 219 (1957).¹

¶4

As a practical matter, a street address is one form of legal description, analogous to (even if sometimes less complete than) the block and lot number of platted property and is at least as descriptive as the common name for a place or farm or a house on a particular street. See 4 Tiffany & Jones, § 997 (“A description of the property as the ‘X’ place or the ‘Y’ farm is not in its nature any more general than a description by metes and bounds.”). I consider it unreasonable to find, as the majority does, that the legislature intended to designate a street address as the sole method of identifying property that is always insufficient to convey property, and I can find nothing in the statute implying as much. Quite the contrary, a street address is in fact the only form of description expressly required for every instrument conveying title to residential property. And merely by indicating, in a statute mandating for the first time the

¹ Hopefully the majority’s reliance on part of a definition from Black’s Law Dictionary, see maj. op. at 10, n. 3, is not intended to imply that all deeds not containing a description by “reference to a government survey, metes and bounds, or lot numbers of a recorded plat” are invalid.

inclusion of street addresses, that a failure to comply will nevertheless not be fatal, the legislature in no way implies an intent that the failure to include another kind of legal description, however, will be fatal. Rather than excluding all others, in this case the expression of one caveat is most naturally explained simply as an acknowledgement that the street address of a residential property is a powerful aid in identifying that property and should be included in any title instrument, but that a failure to do so, in and of itself, will no more invalidate the instrument than would (as we have long held) the failure to include any other particular type of legal description.

¶5 If the legislature had intended by the term “legal description” a specific formula or method of description – something more than simply any description adequately identifying the property at issue – to be mechanically included in every deed, without which the deed would be invalid and unrecordable, one might think it would have specified the required formula or method. It did not do so, however, and instead, virtually every aspect of the statutory scheme dealing with interests in real property and the conveyancing and recording of those interests militates against such a mechanical or formalistic understanding. In its general policy statement regarding titles, the legislature expressly indicates that the purpose of its conveyancing and recording provisions is to render title to real property more secure and marketable, and to that end, laws affecting record title should be construed wherever possible to avoid defeating by technical or strict constructions the record title of a party in possession. § 38-34-101, C.R.S. (2011). With regard to the benefits of recording in particular, in addition to the extremely broad description of recordable instruments chosen for

section 38-35-109 itself, the statutory scheme is replete with provisions designed to ensure that various defects in recorded instruments not weaken or limit the presumption of notice. See, e.g., § 38-35-106, C.R.S. (2011) (“Any written instrument required or permitted to be acknowledged affecting title to real property, whether acknowledged, unacknowledged, or defectively acknowledged after being recorded in the office of the county clerk and recorder of the county where the real property is situate, shall be notice to all persons or classes of persons claiming any interest in said property.”).

¶6 Until today, as the majority appears to acknowledge, we have steadfastly taken this view and found that errors in the description of real property do not necessarily render an offending instrument unrecordable or incapable of constructively providing notice of existing interests. The majority’s only basis for declining to apply this principle to instruments describing the subject property solely by street address is its interpretation of section 38-35-122, as invalidating all deeds lacking some other form of legal description. For the reasons I have briefly outlined, I consider the majority’s construction of this statute to be unjustified by its specific language, our prior decisions, the interpretative directives of the legislature, or the policy evidenced by the statutory scheme as a whole.

¶7 Because I believe every property description in an instrument purporting to affect title must be considered under the circumstances of each case to determine whether it adequately identifies the subject property, I could not answer the broadly-phrased certified question in the affirmative even if I were to agree that recording is in any way

contingent on an instrument's actual ability to affect title. I take comfort in the fact that the majority merely offers an advisory opinion to another government, which I consider to have (even if we are constitutionally authorized to offer it) no precedential or binding effect on the lower courts of this jurisdiction or our future resolution of actual cases and controversies.

¶8

I therefore respectfully dissent.